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In the

Supreme Court of the United States

October Term, A. D. 1940

No. .....

MAX HAMBURGER,
Petitioner,

vs.

JOHN A. DYER, Trustee; LOUIS H. CHARBONNEAU, THOMAS N. DYSART and HAROLD McB. THURSTON, constituting The Belcrest Apartments, First Mortgage Bondholders' Committee; and MELVIN L. STRAUS and CARL S. WELLS, indenture trustees,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioner's statement of the case is acceptable as far as it goes, but it is not complete. One controlling fact is omitted.

That is the fact that the Belcrest Hotel, the property covered by the first mortgage, is the only property involved in this case.

The finding of the Circuit Court of Appeals on this fact is contained in the second sentence of its opinion:

> "Appellants Hamburger and Singer each owned one-half of the Belcrest Hotel, which is the only real estate involved in the proceeding, and as this record shows, the only asset of the debtors." F. R. 212, S. R. 44.

Petitioner has not questioned this finding.

POINTS RELIED ON FOR AFFIRMANCE

(1) Under Chapter XII where a secured debt is greater than its security, an arrangement which permits the debtor or unsecured creditors to participate *in the proceeds of the mortgaged property* cannot be confirmed.

(2) In the instant case, the mortgaged property constitutes the only property of the debtors.

(3) The distinctions drawn by petitioner between arrangements and reorganizations are artificial and meaningless.

(4) In a proceeding under Chapter XII, an arrangement can be confirmed without the consent of the debtor.

(5) The Committee's arrangement was properly proposed.

ARGUMENT

I.

IN THE INSTANT CASE, SINCE THE MORTGAGED PROPERTY CONSTITUTES THE ONLY PROPERTY OF THE DEBTORS AND THE SECURED DEBT IS GREATER THAN ITS SECURITY, AN ARRANGEMENT WHICH PERMITS THE DEBTOR OR UNSECURED CREDITORS TO PARTICIPATE IN THE PROCEEDS OF THE MORTGAGED PROPERTY CANNOT BE CONFIRMED

Of the seven "Questions Presented" listed in the petition for certiorari, the first six are based upon an assumption of facts which are not present in this case, namely: the assumption that these debtors have assets other than the mortgaged property. Petitioner's favorite phraseology is:

> "Where a secured debt is greater than the value of its security, can the court, ipso facto, say * * *"

Now the truth of this case is that the court did not "ipso facto, say * * *." The orders appealed from are based not "ipso facto" upon the fact that the secured debt in this case is greater than the value of its security, but upon that fact plus the equally—perhaps more—important fact that the debtors have no other assets.

Petitioner, at the outset of his argument, tries to create a positive impression that there are other assets by stating "The schedules of each disclosed as assets their interest in the Belcrest Hotel which they owned jointly (F. R. 20, 51) and certain personal property."

This is a misleading statement. While some trivial items were scheduled as indicated, there are actually no assets involved in this case except the mortgaged property. The concurrent findings of fact of the District Court and of the Circuit Court of Appeals on this point are conclusive. *Vir-*

ginian Railway v. Federation, 300 U. S. 515, 542; *Pick Mfg. Co. v. General Motors Corp.*, 299 U. S. 3; *U. S. v. O'Donnell*, 303 U. S. 501, 508; *Continental Illinois Bank v. Chicago Rock Island & Pac. Railway*, 294 U. S. 648, 678; *Page v. Arkansas Natural Gas Co.*, 76 L.Ed. 1096, 1098.

With this fact in mind, what becomes of petitioner's arguments? His first two points as set forth in his brief are as follows:

I. Under Chapter XII a Debtor Cannot Automatically Be Barred from Participation in Every Possible Arrangement Solely Because a Secured Claim Exceeds the Value of its Security.

II. Under Chapter XII Unsecured Creditors Cannot Automatically be Barred from Participation in Every Possible Arrangement Solely Because a Secured Claim Exceeds the Value of Its Security.

Quite so. In some other case a debtor might have substantial assets in addition to the mortgaged property. But not here.

In this case, and on these points, our only contention is that neither the debtor nor the unsecured creditors may share in the proceeds of the mortgaged property.

We contend that the words "fair and equitable" as used in Chapter XII, Section 472, are words of art having a fixed meaning as determined by this court in numerous decisions. *Northern Pacific Railway Co. v. Boyd*, 228 U. S. 482; *Case v. Los Angeles Lumber Products Co.*, 308 U. S. 109; *In Re Church Street Building Corp.*, 299 U. S. 24; *Securities and Exchange Commission v. U. S. Realty & Improvement Co.*, 310 U. S. 434; *Consolidated Rock Products Co. v. DuBois*, 85 L.Ed. 603.

Since, in the instant case, neither of the debtors have any assets outside of the mortgaged property, the decisions cited must be held to control the disposition of this case in its entirety.

II.

THE DISTINCTIONS DRAWN BY PETITIONER BETWEEN ARRANGEMENTS AND REORGANIZATIONS ARE ARTIFICIAL AND MEANINGLESS

Petitioner argues that there exist two legal conceptions, one known as a composition and the other as a reorganization. By arbitrarily classifying Chapters XI and XII as compositions, he endeavors to show that the construction placed by this court upon the words "fair and equitable" as used in Chapter X does not apply to the same words when used in Chapter XII.

We submit that these conceptions do not exist as classifications of legislation from which rules of construction may be drawn. We submit that every legislative act relating to compositions, arrangements or reorganizations must stand on its own feet and be construed according to its own provisions.

In the case of Chapter XII, Congress has specifically provided, Section 466, that the creditors may propose an arrangement. This one provision clearly precludes the classification of Chapter XII of the present act with Section 12 of the old act. In *Case v. Los Angeles Lumber Company*, supra, this court pointed out that Section 77B contemplates a procedure and results not permissible under Section 12. We contend that Chapter XII also contemplates a procedure and results not permissible under Section 12. If it does not, what is the purpose of Section 466?

III.

IN A PROCEEDING UNDER CHAPTER XII, AN ARRANGEMENT CAN BE CONFIRMED WITHOUT THE CONSENT OF THE DEBTOR

Section 466 of Chapter XII provides:

> "An arrangement which has been approved by creditors affected thereby, who hold debts against the property dealt with therein, amounting to 25 per per centum or more of the debts of some class of such creditors and 10 per centum or more of the debts of all such creditors, may be proposed by any such creditor."

It will be noted that this section provides certain conditions precedent to the proposal of an arrangement by creditors.

Under the established rule of statutory construction of *expressio unius est exclusio alterius* approved by this court in *U. S. v. Barnes*, 222 U. S. 513, 56 L. Ed. 291 where the legislature has specified certain requirements as conditions precedent to the exercise of a right, these express requirements must be construed to be the only requirements. Other requirements, in the instant case the consent of the debtor, may not be implied.

Similarly, the conditions precedent to the confirmation of a plan have been stated in Section 472 as follows:

> "The court shall confirm an arrangement if satisfied that—(1) The provisions of this chapter have been complied with; (2) It is for the best interests of creditors; (3) It is fair and equitable, and feasible; (4) The debtor has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to the discharge of a bankrupt; (5) The proposal and its acceptance are in good faith and have not been made or procured by any means,

promises, or acts forbidden by this Act; and (6) All payments made or promised by the debtor, by any person issuing securities or acquiring property under the arrangement or by any other person, for services and for costs and expenses in, or in connection with, the proceeding or in connection with and incident to the arrangement, have been fully disclosed to the court and are reasonable, or, if to be fixed after confirmation of the arrangement, will be subject to the approval of the court."

Again, there is no requirement that the debtor give his consent and, under the same rule of construction, no such requirement may be implied.

As cumulative evidence that Congress intended plans to be confirmed under Chapter XII without the debtor's consent, we respectfully refer to the following additional provisions of Chapter XII:

Section 461 which covers the provisions of arrangement reads in part as follows:

"Section 461. An arrangement—(12) Shall provide adequate means for the execution of the arrangement, which may include: * * * the sale or transfer of all or any part of his (the debtor's) property in trust or to one or more corporations theretofore organized or thereafter to be organized."

Section 475 reads as follows:

"The court may direct the debtor, his trustee, any mortgagees, indenture trustees, and other necessary parties to execute and deliver or to join in the execution and delivery of such instruments as may be requisite to effect a retention or transfer of the property dealt with by the arrangement which has been confirmed, and to perform such other acts, including the satisfaction of liens, as the court may deem necessary for the consummation of the arrangement."

If, as petitioner contends, no arrangement can be confirmed without the consent of the debtor, why was it necessary for Congress to provide that "the court may direct the debtor to execute conveyance of property," etc.? Obviously, the sole purpose of the two sections quoted above is to give the court the authority to consummate a fair and equitable plan even where the debtor opposes it.

IV.

THE COMMITTEE'S ARRANGEMENT WAS PROPERLY PROPOSED

Petitioner's final argument is that "a bondholders' committee cannot propose an arrangement prior to a determination that it is a creditor and without leave of its controlling Commission." There is no authority for this argument. The term "creditors" as used in Chapter XII is defined in Section 406(5) simply as follows: "Creditors shall mean the holders of claims."

Section 466 which sets up the conditions precedent to the proposal of an arrangement does not make the prior determination of claims at the first meeting such a condition.

Furthermore, since one of the functions of the first meeting is to "determine the written acceptances of creditors on a proposed arrangement" Section 436(4), to deny creditors the right to propose their arrangement before the first meeting as appellants insist should be done, would be to effectively prevent their arrangement from ever being voted on. That, obviously, is what appellant intends, but that, we submit, is certainly not what Congress intended.

The argument likewise is unsound in fact. Debtors' schedules set forth the mortgage (F. R. 16, 46). The affidavit of Sills (F. R. 129) filed in July of 1939, set out in

full the facts with respect to the mortgage indebtedness. The petition of the Committee proposing an arrangement filed in July, 1939 (F. R. 135) set forth the total outstanding unsubordinated bonds and the bonds deposited with the Committee as did the arrangement proposed (F. R. 148).

With respect to petitioner's argument that the Bondholders' Committee did not have leave of the Public Trust Commission to propose or sponsor the arrangement, petitioner states at page 31 of his brief:

> "The record shows that no application was filed by the Committee with the Public Trust Commission for leave to propose or sponsor the arrangement. Subsequently, at or about the time of the confirmation, the Committee did obtain a letter from the Commission disclaiming jurisdiction and at the same time approving the procedure already taken."

This statement does not correctly present the situation. The record with respect to the proceedings before the Public Trust Commission is incomplete. It is incomplete for the sole reason that petitioner has refused to supply a stenographic transcript of the proceedings before the District Judge. The facts are and the stenographic transcript would show:

(a) The protective committee at all times denied the necessity of any application to or order from the Public Trust Commission.

(b) The Public Trust Commission agreed with the position taken by the protective committee and disclaimed jurisdiction.

(c) Appellants insisted that the protective committee must have the approval of the Public Trust Commission.

(d) To eliminate this controversy as a possible ground for appeal, the District Judge directed that a hearing be

held before the Public Trust Commission and that their approval be obtained before he would confirm the arrangement in these proceedings.

(e) The Public Trust Commission gave notice of a meeting of bondholders for this purpose to be held July 8, 1940 and the meeting was duly held.

(f) Thereafter, on July 9, 1940, a representative of the Public Trust Commission appeared at a hearing held in these proceedings before the District Judge, was duly sworn as a witness and offered in evidence a copy of the Public Trust Commission's order approving and ratifying everything done by the protective committee in connection with their proposed arrangement.

The foregoing statement of facts not included in the record before this court is made for the sole purpose of correcting the statements of petitioner quoted above which are likewise unsupported by the record before this court.

On the question of the original proposal of the bondholders' plan, the District Court, in its order confirming the arrangement, found that

> "(a) All provisions of law or of the orders of this court heretofore entered with respect to the publishing and giving of notice of the hearings aforesaid, the time and manner of filing claims or acceptances of or objections to said proposed arrangement, and all other matters and things precedent to this order have been fully done and performed." (S. R. 20).

Where evidence is not preserved, the findings of the District Judge on the facts are controlling. *Kaschefsky v. Kaschefsky*, 110 Fed. (2d) 836.

Since the judgment of the District Court was affirmed, the concurrent findings of fact of the District Court and of

the Circuit Court of Appeals are conclusive. *Virginian Railway v. Federation,* supra; *Pick Mfg. Co. v. General Motors Corp.,* supra; *U .S. v. O'Donnell,* supra; *Continental Illinois Bank v. Chicago Rock Island & Pac. Railway,* supra; *Page v. Arkansas Natural Gas Co.,* supra.

CONCLUSION

The purpose of this brief has been two-fold: first, to call attention to the undisputed facts of the case; and second, to present the principles of law applicable to the questions arising out of those facts. We have not discussed the matter of the debtors' discharge for the reason that both the arrangement confirmed and the order confirming the arrangement provide for complete discharges for both debtors, the effect of the arrangement and the order confirming the arrangement has been questioned neither by these respondents nor by any creditor but solely by petitioner, the order confirming the arrangement was affirmed by the Circuit Court of Appeals without modification, and the comments of the Circuit Judge are purely *dicta* and not pertinent to the issues before the court.

In conclusion, we have shown that the debtors had no assets other than the mortgaged property, that under the decisions of this court neither the debtors nor the subordinate creditors may share in the proceeds of the mortgaged property, that Chapter XII contemplates a procedure and results not permissible under Section 12 of the old Bankruptcy Act, that the arrangement can be confirmed without the consent of the debtor, and that the Bondholders' Committee arrangement was properly proposed.

When the complete facts of the case as presented herewith are considered, it becomes evident that the novel questions framed by the petitioner are not before this court at all, and that for this court to accept jurisdiction to determine a series of moot questions would serve merely to further delay the orderly administration of this estate to the great damage of the bondholders and with no possibility of legitimate benefit to the debtors. The writs, therefore, should not issue.

Respectfully submitted,

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